IN THE MATTER OF	:	BEFORE THE
AMHA, LLC, & BRITISH AMERICAN BUILDING, LLC	:	HOWARD COUNTY
	:	BOARD OF APPEALS
Appellants	:	HEARING EXAMINER
v.	:	BA Case No. 702-D
HOWARD COUNTY DEPARTMENT OF PLANNING AND ZONING		**In re: Interested Party Two Farms, Inc., Motion to Dismiss the Administrative Appeal of AMHA, LLC, & British American Building, LLC**
Appellee		

ORDER

On June 30, 2014, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, conducted a hearing on the administrative appeal of AMHA, LLC, & British American Building, LLC (Appellants). Appellants are appealing the Howard County Department of Planning and Zoning's February 11, 2014 decision to grant Two Farms Inc.'s, request for a waiver from Subsection 16.119(f)(1)of Howard County Subdivision and Land Development Regulations, which waiver allowed vehicular access to an arterial road (Snowden River Parkway). On June 4, 2014, Two Farms timely moved to dismiss the administrative appeal for Appellants' lack of standing. The June 30, 2014 hearing was therefore limited to oral argument and testimony on the issue. Upon consideration of Two Farms' motion to dismiss, Appellants' response to the motion, testimony and oral arguments presented at the motions hearing, the Hearing Examiner has determined to grant Two Farms' motion to dismiss the administrative appeal.

Sang Oh, Esquire, represented Interested Person Two Farms, Inc. (Two Farms). Katherine Taylor, Esquire, represented AMHA, LLC (AMHA), & British American Building, LLC (British American). Paul Johnson, Deputy County Solicitor, represented the Department of Planning and Zoning (DPZ).

Two Farms introduced into evidence the exhibits as follows.

1. Resume of Mickey A. Cornelius
2. Resume of Christopher J. Rosata

A Preliminary Matter

By letter of June 18, 2014 to the Hearing Examiner from Brian England, Managing Member, British American, and Amran Pasha, Managing Member, AMHA, Appellants moved to have the Owen Brown Community Association (OBCA) added as an appellant to the instant appeal. The letter included a resolution from the OBCA Board of Directors to join the appeal and further stated "[t]he Rules of Procedure provide for automatic standing in the case of duly constituted Community Associations. Accordingly, the interested party's Motion to Dismiss appears to be moot. Hence we, respectfully request that you deny the pending Motion to Dismiss."

Responding to the motion at the outset of the hearing, Two Farms noted it was not waiving its right to contest the motion where it did not receive certificate of service for the letter until June 23, 2014, which did not provide counsel adequate time under Hearing Examiner Rule 7.5 to respond within 15 days.[1] It then contended OBCA could appeal the waiver decision only by filing an appeal petition within thirty days of the DPZ waiver decision. DPZ concurred with Two Farms. Katherine Taylor, who did not represent OBCA, suggested the request should be characterized as a permissible motion to intervene in the case, which she characterized as "not quite an appellate case."

The Hearing Examiner ruled that individuals wishing to appeal a county agency administrative decision must file an administrative appeal petition within 30 calendar days of the pertinent

[1] Rule 7.5. Preliminary Motions. A party may request the hearing examiner to address a preliminary matter prior to the date of the initial hearing by filing the request as a motion to the hearing examiner and certifying that a copy was provided to all persons known to have an interest in the case, including but not limited to the Petitioner, the property owner, the administrative agency, or any person entitled to written notification under §2.203 of the Board's Rules. The certification must state, "any person interested in responding to this motion must file a written response with the hearing examiner within fifteen days of the date that the motion was filed." The hearing examiner may rule on the motion at any time after a response is filed or fifteen days after the filing of the motion.

administrative agency decision, which in this case was February 11, 2014. Having filed no such petition within the requisite time, OBCA is not a proper appellant and the Appellants are time-barred from adding OBCA as a co-appellant. Importantly, Appellants predicated their motion to add OBCA as a co-appellant in furtherance of their interest in foreclosing dismissal of the appeal for lack of standing and to this end, they construed Hearing Examiner Rule 6.3 as according associations "automatic standing."[2] Rule 6.3, however, has a limited purpose; it authorizes an individual to represent an association upon substantiating that he or she is authorized to speak for and present the views of that association.[3] The intent behind Rule 6.3 is to foreclose objections to the representative's testimony on hearsay grounds, and more generally, to encourage association participation. It does not confer standing upon community associations.

I. GENERAL BACKGROUND

Interested Person Two Farms desires to construct a gasoline service station and convenience store at 9585 Snowden River Parkway (the subject property), which is located at the southeast corner of the intersection of Snowden River Parkway and Minstrel Way. At some juncture, Two Farms requested a waiver from Subdivision Regulations § 16.119(f)(1) to allow the street layout of the proposed Royal

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[2] During the proceeding, the Hearing Examiner took notice of the potential intervention of a community association (or interested person) at a *hearing on the merits* of an administrative appeal petition under *Jacob Hikmat v. Howard County*, 148 Md. App. 502, 813 A.2d 306 (2002). In *Hikmat*, the Court of Special Appeals upheld the circuit court's decision to allow nearby property owners with inadequately represented and protectable interests to intervene in DPZ's judicial appeal of a Board of Appeals decision to reverse and deny a DPZ waiver of the Subdivision Regulations, where the Board denied the property owners the right to testify pursuant to county policy. Thus, in Board of Appeals Case No. 607-D, an administrative appeal concerning DPZ's denial of waivers from the Howard County Design Manual to construct steep slopes and a noncompliant driveway (decided November 15, 2007), this Hearing Examiner allowed adjoining property owners to testify about existing sediment control and runoff problems, making no determination as to their party status.

[3] Rule 6.3. Representatives of Associations. An individual representing any association must substantiate that he or she is authorized to speak for and present the views of that association. The authorization may consist of a duly adopted resolution of the association signed by the president or attested by the secretary. The individual testifying must state the number of members in the association and its geographic boundaries.

Store development to include vehicular access to Snowden River Parkway, an arterial road. Snowden River Parkway is a divided road with a partly landscaped median strip, two eastbound and two westbound lanes and deceleration/acceleration lanes. The Property is part of the EGU (Employment-Guilford) subdivision, also known as the Guilford Industrial Park. DPZ granted the requested waiver for right-in/right-out vehicular access onto Snowden River Parkway on February 14, 2014.

Appellant AMHA is the property owner of 7100 Minstrel Way, which is located on the northeast corner of the intersection of Minstrel Way and Snowden River Parkway. Amran Pasha is the managing member of AMHA. The property is improved with a convenience store. Another entity owns the gasoline service station on the site. British American owns real property at 9577 Berger Road, located at the intersection of Berger Road and Gerwig Lane, within the Guilford Industrial Park. Brian England is the managing member of British American. The property is improved with an automotive repair and service structure. AMHA and British American are opposed to the waiver. Their administrative appeal petition alleges AMHA is prima facie aggrieved because he is an adjoining property owner. British American claims to be aggrieved because its property and Two Farms' property are located within the Guilford Industrial Park, which is subject to certain deed restrictions (covenants) and further, that the British American Property is sufficiently close to the subject property to be considered a nearby property owner.

II. MOTIONS

Two Farm's Motion to Dismiss the Appeal for Lack of Standing

Two Farms argues Appellants lack standing to pursue the appeal, asserting the right to appeal is wholly statutory and that Howard County Code (HCC) § 16.105 provides the standard for appealing DPZ's determination of a waiver petition, which is that to appeal an order of the Department of Planning and Zoning, an *aggrieved* person must appeal the decision to the Board of Appeals (BOA) within 30 days. The

motion also declines to concede that AMHA is prima facie aggrieved, a presumption that Two Farms would nonetheless rebut with evidence that it was no more aggrieved than the general public under the "specially aggrieved test" because the access will have no effect on it in light of a long line of Maryland cases setting forth a (three-tier) system of different burdens for establishing aggrievement based on the proximity of the appellant to the project site at issue. Two Farms also alleges British American is not specially aggrieved because it is not a nearby property owner.

Appellants' Response to Two Farms' Motion to Dismiss

The gist of Appellants' response to Two Farms' motion to dismiss for lack of standing is that the aggrievement standards applicable to the judicial review of administrative land use decisions are inapplicable to an administrative appeal of a DPZ waiver decision. Appellants make four arguments in support of this position.

1. Two Farms misrelies on the Maryland Courts' requirement that a person be "specially" aggrieved to have standing for on the record judicial review of a land-use related administrative decision, contrary to HCC § 16.105, which provides for appeals to the BOA or Hearing Examiner (HE) from a "person aggrieved."

2. Md. Local Government Code Ann. § 10-305(b)(2) (2014) authorizes a county board of appeals to review the action of an administrative officer or unit of county government over matters arising under any law, ordinance, or regulation of the county council that concerns ... (2) the issuance ... of any ... waiver ..."under "rules of practice" enacted under local law, per § 10.305(a)(3). Because HCC § 16.105 fails to define the meaning of "aggrievement" for the purposes of determining who is a "person aggrieved," the broad definition of standing in BOA Rule of Practice 2.206 controls, reading § 2.206 as placing no limits on "individual[s] wishing to appeal an administrative decision of a county agency" and simply mandating that these "individuals" "file an appeal on the petition provided by the Department of Planning and Zoning within thirty days of the date of that administrative decision. "

3. Maintaining the broad aggrievement standard contemplated in the BOA Rules of Practice protects a fundamental due process right of the citizens of Howard County. Although the idea that a litigant must suffer a particular injury and not simply seek to right a public wrong derives from the Constitutional separation of powers, in which the Court does not interfere with executive and legislative authority, this narrowly tailored constriction on due process is bounded by "the right of citizens" to challenge the decision, where no public input was sought or received and no legislatively-enacted body vetted the decision. The appeal to the HE is the first formal opportunity available to the citizens of Howard County

to challenge the executive agency (DPZ) decision and due process should guarantee the public a legitimate say in decisions made in the public interest.

4. The special aggrievement standard and its "proximity" tests do not apply to a waiver petition because the courts have not applied these tests in the context of a waiver decision.

With respect to Appellants' arguments, their broad argument that the application of judicial doctrine as to who is a person aggrieved to persons appealing a DPZ waiver decision contravenes their fundamental right of due process must be roundly rejected. Constitutional due process under the Fourteenth Amendment and Article 24 of the Maryland Declaration of Rights does not attach to any right of appeal.[4] It is not a necessary element of due process of law. *Lindsey v. Normet*, 405 U.S. 56, 77 (1972) (citations omitted). Rather, as Two Farms argued, the right to appeal is discretionary and statutory, as discussed infra.

Appellants also seek to locate a definition of "aggrieved person" within the "public interest" standard governing the granting of waivers under Howard County Code (HCC) § 16.104. To frame this argument, Appellants analogize to *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972) (holding Sierra Club lacked standing, having failed to plead a particular cognizable injury associated with the agreement) where a federal statute created an explicit legal interest in members of the general public to enforce the applicable federal laws. HCC § 16.104 is statutory right of appeal from an administrative land development decision and there is no comparable originating state or county statute assigning any person an explicit legal interest to protect the public interest. Moreover, in seeking standing, the Sierra Club relied on § 10 of the Administrative Procedure Act, 5 U.S.C. § 702, which provides: A person suffering legal wrong

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[4] The due process clause of the Fourteenth Amendment and Article 24 of the Maryland Declaration of Rights narrowly protect an individual's interests in procedural due process. See *Roberts v. Total Health Care, Inc.*, 349 Md. 499, 709 A.2d 142 (1998). Due process within administrative proceedings requires the opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545 (1965). A more complete review of procedural due process as it applies to the Howard County BOA/Hearing Examiner administrative hearing process is provided in Board of Appeals Case No 646-D (decided November 28, 2008).

because of agency action, or *adversely affected or aggrieved by agency action* within the meaning of a relevant statute, is entitled to judicial review thereof (emphasis added).

Appellants' argument that HCC § 2.206, a BOA Rule of Procedure, is a de facto definition of a "person aggrieved" conferring a broad right of standing to prosecute the waiver decision, absent a definition of the term in HCC § 16.105 does not pass scrutiny when reviewed under the relevant statutes and regulations. Appellants' additional arguments are discussed in Part IV.

III. CONTROLLING LAW

Maryland Law (the Code of Maryland)

We begin, as did Appellants, with Md. Local Government Code Ann. § 10-305(a)(1), which grants charter counties like Howard County discretionary authority to enact local laws to establish a board of appeals.[5] Section 10-305(b) establishes in pertinent part the board's subject-matter jurisdiction over matters arising under any law, ordinance, or regulation of the county council that concerns an application for a zoning variation or exception or amendment of a zoning map or the issuance, renewal, denial, revocation, suspension, annulment, or modification of any license, permit, approval, exemption, *waiver*, certificate, registration, or other form of permission or of any adjudicatory order (emphasis added.) Section 10-305(a)(3) empowers boards of appeals to adopt rules of practice governing its proceedings.

The Howard County Charter

Pursuant to this enabling authority (under then Maryland Code 1957, art. 25A, § 5(U), Article V of the Howard County Charter (Charter), § 501 establishes a Board of Appeals. Charter § 501(b) defines the BOA's limited subject-matter jurisdiction: to exercise the functions and powers relating to the hearing and

[5] In 2013, the General Assembly added new Local Government Article to the Annotated Code of Maryland. The Article restates and recodifies state law relating to local government. The Article in pertinent part repealed in its entirety, Article 25A, Chartered Counties of Maryland, the statute for the establishment of a board of appeals.

deciding, either originally or on appeal or review, of such matters as are or may be set forth in Article 25a, Subparagraph (u) of the Annotated Code of Maryland, excluding those matters affecting the adopting of or change in the general plan, zoning map, rules, regulations or ordinances.

Charter § 501(c) delimits the BOA's authority to adopt rules of practice and procedure.

> (c) Rules of practice and procedure. The Board of Appeals shall have authority to adopt and amend rules of practice governing its proceedings which shall have the force and effect of law when approved by legislative act of the Council. Such rules of practice and procedures shall not be inconsistent with the Administrative Procedure Act of the Annotated Code of Maryland. The rules may relate to filing fees, meetings and hearings of the Board, the manner in which its Chairperson shall be selected and the terms which he shall serve as Chairperson and other pertinent matters deemed appropriate and necessary for the Board.

Charter § 501(f) provides that the powers and functions of the Board of Appeals as herein provided for shall be defined by implementing legislation heretofore or hereafter enacted by the Council, subject to and to the extent required by applicable State law. Section 502 authorizes a hearing examiner (HE) to conduct hearings and make decisions concerning matters within the jurisdiction of the Board of Appeals and for the County Council to establish by legislative act the duties, powers, authority and jurisdiction of any examiner appointed under this section.

The Howard County Code, the Hearing Examiner Rules of Procedure and the Zoning Regulations

Consistent with Charter § 501(f), the BOA and Hearing Examiner's (HE) powers and functions are defined by implementing legislation contained in the HCC. HCC Title 16 contains the Planning, Zoning Subdivision and Land Development Regulations, including regulations pertaining to the BOA and HE's original and appellate jurisdiction to review specific zoning, subdivision and land development matters. Subtitle 3, Board of Appeals, HCC §16.301, delimits the BOA's original jurisdiction to three zoning powers under Title 16: 1) to authorize variances from the zoning regulations, excluding variance for governmental uses of land (§ 16.301(a)), 2) to authorize uses provided by the zoning regulations, excepting special use

variances for governmental uses of land (§16.301(c)) and 3) to hear and decide citations issued, under subtitle 16 of this title, for a violation of the subdivision and land development regulations set forth in subtitle 1 of this title or the Howard County Zoning Regulations. Pursuant to HCC § 301(b), the Board has appellate jurisdiction to hear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by any administrative official in the application, interpretation, or enforcement of this title or of any regulations adopted pursuant to it.

HCC § 16.302(a), Jurisdiction of the Hearing Examiner, provides, with certain exceptions, for an HE to first hear and decide a matter authorized by the HCC or zoning regulations to be heard and decided by the BOA. Section 16.303(f) provides for HE procedures, including the adoption of rules of procedures to govern "the conduct of hearings," which are effective upon approval by resolution of the Council. Charter § 914(c) defines "resolution" as a "measure adopted by the Council having the force and effect of law" and clarifies that such law is of a "temporary or *administrative* character" (emphasis added). HCC § 16.304(a), Appeal to Board of Appeals, authorizes appeals to the BOA by a person aggrieved by a decision of a Hearing Examiner within 30 days of the issuance of the decision.

Title 16, Subtitle 1 (HCC § 16.100 et seq.) covers the Subdivision and Land Development Regulations. Two Farms' waiver request and DPZ's approval is controlled by HCC § 16.104. Of issue in this case is HCC § 16.105(a), Appeals to Board of Appeals: "[a] person aggrieved by an order of the Department of Planning and Zoning may, within 30 days of the issuance of the order, appeal the decision to the Board of Appeals ..." Also addressed in HCC Title 16 is the BOA's appellate jurisdiction from the Planning Board decision-making authority under HCC § 16.900 et seq. Under § 16.900(j)(2)(iii), "[a]ny person specially aggrieved by any decision of the Planning Board and a party to the proceedings before it may, within 30 days thereof, appeal said decision to the Board of Appeals in accordance with section 501 of the Howard

County Charter. For purposes of this section the term "any person specially aggrieved" includes but is not limited to a duly constituted civic, improvement, or community association provided that such association or its members meet the criteria for aggrievement set forth in subsection 16.013(b) of this title."[6]

Zoning Regulations (ZR) §130 et seq., pursuant to Charter § 502 and HCC § 16.301, establishes a Hearing Authority (the BOA and HE) and confers upon it these general original subject-matter jurisdiction powers: 1) to hear nonconforming uses as provided by § 129.0; 2) to grant variances from the Zoning Regulations' parking requirements and bulk regulations and; 3) to approve conditional uses as provided in § 131.0. The Hearing Authority has appellate jurisdiction under ZR § 130.3.

> Appeals to the Hearing Authority may be taken by any *person aggrieved*, or by any officer, department, Board or bureau of the County affected by any decisions of the Department of Planning and Zoning. Such appeal shall be filed not later than 30 calendar days from the date of the action of the Department of Planning and Zoning and shall state the reasons for the appeal. Appeals with a deadline falling on a weekend or holiday must be filed prior to that deadline (emphasis added).

The Rules of Practice and Procedure for the BOA are implemented through HCC Title 2, Administrative Procedure, Subtitle 2 (HCC § 2.200 et seq.), with the provisory that "[t]hese rules *are in addition to* the requirements of section 501 of the Howard County Charter; subtitle 3, "Board of Appeals," of title 16 of the Howard County Code; and the Howard County Zoning Regulations" (emphasis added.) HCC § 2.200. At issue in this appeal is BOA Rule 2.206, "Administrative Appeals," which requires an individual wishing to appeal an administrative decision of a County Agency to file an appeal on the petition provided by DPZ within 30 days of the date of that administrative decision. In accordance with HCC §

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[6] The reference to a subsection "16.013(b)" is a legislative mystery. It may be a typographical error, the possible correct reference being 16.301(b), the BOA's jurisdiction to hear administrative appeals, but this section does not provide a statutory definition of "aggrieved person." The Hearing Examiner's review of Title 16 in older copies of the HCC found no such subsection or definition. The Hearing Examiner surmises it was added to the Planning Board's rules years ago, with the possible intention that the County Council would enact a formal definition of the term. The Hearing Examiner was unable to identify any legislative bill on the subject for the Council's consideration.

16.303, the County Council by resolution adopted Hearing Examiner Rules of Procedure. Hearing Examiner (HE) Rule 3.1 requires petitions to be filed in the manner prescribed in §2.202(a) of the Board's Rules.

Reading this body of law together gives us direction as to their purpose. One set of laws empowers Howard County to enact legislation establishing a BOA/HE administrative hearing system. These same laws set the permissible parameters of the BOA and HE's subject-matter jurisdictional universe—original or appellate—over such matters set forth therein. They also govern the right of appeal, which is statutory; only the General Assembly may expressly grant such a right. Howard County v. JJM, 301 Md. 256, 482 A.2d 908 (1984) (citing Maryland Bd. v. Armacost, 286 Md. 353, 354-55 (1979); Criminal Inj. Comp. Bd. v. Gould, 273 Md. 486, 500 (1975); Urbana Civic v. Urbana Mobile, 260 Md. 458, 461 (1971).

Another set of laws governs administrative components of the hearing system, including the internal operating structure of the BOA and HE and the conduct of hearings. Some are claims-processing rules. Per Charter § 501(c), these claims-processing administrative rules "may relate to filing fees, meetings and hearings," including, as prescribed by HCC § (BOA Rule) 2.206, requiring individuals wishing to appeal an administrative decision of a County Agency do so by filing a "form" petition within 30 days of the date of that administrative decision.

Appellants err in their re-characterizing HCC § (BOA Rule) 2.206, a BOA claims-processing rule, as one invested, by default, with a definition of "aggrieved person." The BOA and HE may not confer upon themselves rules of practice and procedure outside their narrow scope of authority, including who has a right of appeal. The imposition of a definition of "aggrieved person" on these rules of practice is a misunderstanding and misapplication of the BOA/HE legal apparatus. There is no definition of "aggrieved person" in this body of law. (See footnote 8). Its meaning is found elsewhere.

IV. STANDING

Standing as it pertains to the quasi-judicial BOA and HE administrative hearing process is the right to seek a determination, resolution or vindication of a right or interest within the quasi-judicial administrative hearing forum. Persons with standing have "party" status. Within the context of the BOA and HE quasi-judicial administrative hearing process, standing is contingent on whether the BOA or HE is hearing a petition under their original or appellate jurisdiction. The standing doctrines in these two quasi-adjudicatory areas have different eligibility requisites–standing tests—and these tests determine whether the BOA or HE may take jurisdiction and proceed to a merits hearing, which in this case would be a full evidentiary hearing on the DPZ waiver decision.

Standing under the BOA and HE's Original Subject-Matter Jurisdiction

HCC (BOA Rule) § 2.208, Appearances before the Board of Appeals, is the standing test when the BOA is exercising its original jurisdiction. It accords "party" status–standing–to an individual or any other legal entity in such a proceeding before the Board if an individual or entity provides their name, address and signature of the individual or entity and the legal entity's duly authorized representative on a sign-up sheet provided by the Board; testifies before the Board and provides it with the name and address of the party and/or legal entity; or delivers a letter to the Board, received before the close of the record in the case, indicating that the individual or entity is an interested party to the matter before the Board and providing the party's name, address and signature. HE Rule 6.1 sets forth the same standing test for the examiner's original jurisdiction authority as HCC (BOA Rule) § 2.208. Persons with standing in an original jurisdiction hearing, such as hearing on a conditional use or variance petition, or a confirmation/expansion of a nonconforming use, are accorded the procedural due process right to testify, present evidence and cross-examine witnesses.

This "party status" standing regulation is frequently invoked (and misunderstood) as the test for standing when the BOA or HE is hearing a case pursuant to their appellate jurisdiction. The genesis of this confusion appears to be the Maryland high Court's oft-quoted opinion on administrative standing in *Sugarloaf Citizens Ass'n v. Department of Env't*, 344 Md. 271, 686 A.2d 605 (1996). *Sugarloaf* concerned a "contested case" hearing on solid waste incinerator permit applications authorized by Maryland's Administrative Procedure Act.[7] The genesis of the appeal contested case hearing where applicants did not contest opponents' standing. The administrative law judge (ALJ) presiding over the hearing issued a decision concluding opponents lacked standing to seek judicial review of her decision, under either state law or Maryland common law principles of standing embodied in the state Administrative Procedure Act and that the permits should be issued. The department issued the permits. Relying on the ALJ's findings about opponents' standing to seek judicial review, the Circuit Court dismissed opponents' appeal for judicial review. Affirming, the Court of Special Appeals held deference could be given to the administrative decision about opponents' standing to maintain an action for judicial review. On final appeal, the Court of Appeal upheld the administrative decision to issue the permits. On the standing issue, the Court held the ALJ exceeded her proper role by rendering findings and conclusions regarding judicial standing, and the lower courts erred by according deference to her findings and conclusions regarding judicial standing. *Sugarloaf*, 344 Md. at 293, 686 A.2d at 614. In so holding, the Court reviewed the legal standing rules applicable to the respective forums. With respect to standing at an administrative hearing (in *Sugarloaf*, the ALJ contested hearing on the permit applications), the Court made this statement.

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[7] The Administrative Procedure Act, Md. Code, State Gov't §§ 10-101 through 10-305 (2003 Replacement Volume and 2006 Supplement) contains the administrative procedures for most state agencies. The general purpose of these procedures is to create a minimum fair hearing procedure in all agency proceedings. State Gov't §§ 10-201 through 10-227 is the general model for the Howard County BOA and HE rules and governs quasi-judicial proceedings, which in state law are termed "contested case hearings."

The requirements for administrative standing under Maryland law are not very strict. *Absent a statute or a reasonable regulation specifying criteria for administrative standing,* one may become a party to an administrative proceeding rather easily. In holding that a particular individual was properly a party at an administrative hearing, Judge J. Dudley Digges for the Court in *Morris v. Howard Res. & Dev. Corp.*, 278 Md. 417, 423, 365 A.2d 34, 37 (1976), explained as follows:

> "He was present at the hearing before the Board, testified as a witness and made statements or arguments as to why the amendments to the zoning regulations should not be approved. This is far greater participation than that previously determined sufficient to establish one as a party before an administrative agency. See, e.g., *Baxter v. Montgomery County*, 248 Md. 111, 113, 235 A.2d 536 (1967) (per curiam) (submitting name in writing as a protestant*); Bryniarski v. Montgomery Co.*, 247 Md. 137, 143, 230 A.2d 289, 293-94 (1967) (testifying before agency); *Hertelendy v. Montgomery Cty.*, 245 Md. 554, 567, 226 A.2d 672, 680 (1967) (submitting into evidence letter of protest); *DuBay v. Crane*, 240 Md. 180, 184, 213 A.2d 487, 489 (1965) (identifying self on agency record as a party to proceedings); *Brashears v. Lindenbaum*, 189 Md. 619, 628, 56 A.2d 844, 849 (1948) (same). Bearing in mind that the format for proceedings before administrative agencies is intentionally designed to be informal so as to encourage citizen participation, we think that absent a reasonable agency or other regulation providing for a more formal method of becoming a party, anyone clearly identifying himself to the agency for the record as having an interest in the outcome of the matter being considered by that agency, thereby becomes a party to the proceedings."

*Sugarloa*f, 344 Md. 271, 286-287, 686 A.2d 605, 613 (1996) (emphasis added).

What is overlooked in the *Sugarloaf* opinion is this qualifying language: "*[a]bsent a statute specifying reasonable regulations or criteria for administrative standing* ... See, *Clipper v. Sprenger*, 924 A.2d 1160, 1171, 399 Md. 539 (2007) ("[t]he limiting language used by this Court in *Sugarloaf* ... is important and may not be disregarded") (internal citations omitted). In Howard County, HCC (BOA Rule) §2.208 and HE Rule 6.1 are the regulatory criteria for standing in petitions heard pursuant to the BOA and HE's *original* jurisdiction. These criteria codify the low threshold for administrative standing set out in *Sugarloaf* absent a reasonable regulation or other language providing for party status. Different statutory criteria apply when a person is seeking review of a decision under these authorities' appellate jurisdiction.

Standing under the BOA and HE's Appellate Subject-Matter Jurisdiction

With respect to land use matters, the BOA and HE under HCC § 301(b) have appellate jurisdiction to review three final administrative actions: a DPZ order as it relates to any final action governed by the

Subdivision Regulations, any action governed by the Zoning Regulations and any decision of the Planning Board. The statutory criterion for a person appealing a final DPZ Subdivision Regulations decision is that the person be "aggrieved." HCC § 16.105(a). This same criterion applies to the appeal of any person, officer, department, Board or County bureau affected by any DPZ decision made pursuant to ZR § 130.3 and to an appeal from a decision of the HE to the BOA. HCC § 16.304(a). The statutory criteria to take an appeal from a Planning Board decision further restricts the class of persons who may appeal to those who are "specially aggrieved" *and* a party to the applicable Planning Board proceeding. HCC § 16.900(j)(2)(iii) (emphasis added).

"Aggrieved Person" Standing Doctrine

Bryniarski v. Montgomery Co. Bd. of Appeals, 247 Md. 137, 230 A.2d 289 (1967), the milestone case on aggrieved person standing doctrine in appeals authorized by Maryland zoning statutes, defines the principles governing the determination of whether a party is sufficiently aggrieved to possess standing to appeal to a board of appeals.[8] The Court of Appeals stated in *Bryniarski*: "Generally speaking, a person aggrieved is one whose personal or property rights are adversely affected by the decision. The decision must not only affect a matter in which the protestant has a specific interest or property right, but his interest therein must be such that the person is personally and specifically affected in a way different from that suffered by the public generally." *Bryniarski*, 247 Md. at 144, 230 A.2d at 296.

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[8] *Bryniarski* offers a brief history of the legal historical origins of the "aggrieved person" standing doctrine. "The requirement that a person must be 'aggrieved' in order to appeal to the Board and from the Board to a court of record was originally included in the Standard State Zoning Enabling Statute and generally appears in State Zoning Enabling Acts and in municipal zoning ordinances throughout the United States. See 2 Rathkopf, The Law of Zoning and Planning, sections 63-14 to 63-15 (3d ed.) and particularly note 3. This requirement is contained in the Maryland Zoning Enabling Act, Code (1957), Article 66B, sections 7(d) and 7(j). The term 'person aggrieved' generally appears in the municipal zoning ordinances ... There have been many cases in Maryland and in other states considering the meaning of 'a person aggrieved,' but, apparently, the word 'aggrieved' has never been legislatively defined." *Bryniarski*, 247 Md. at 143, 230 A.2d at 294.

Bryniarski distinguished the status of persons seeking standing as an "aggrieved person" based on the location of the owner of property alleging aggrievement relative to the subject property (the site of the contested zoning decision). On one side of the aggrievement divide—the "standing" fence—are adjoining, confronting or nearby property owners deemed, prima facie, to be specially damaged and, therefore, persons aggrieved. On the other side are property owners who will not ordinarily be considered aggrieved because their property is far removed from the subject property. The proximity of the property owner to the subject property determines the legal burden of proof required to acquire aggrieved person status.

The prima facie aggrievement burden of proof. The fact of a person seeking standing as an aggrieved person based on property adjoining, confronting or being nearby the subject property is presumptive evidence of special damage. "The person challenging the fact of aggrievement has the burden [of production] of denying such damage in his answer to the petition for appeal and of coming forward with evidence to establish that the petitioner is not, in fact, aggrieved." *Id.* at 145, 230 A.2d at 294.

The burden of proof for other property owners. A person whose property is far removed from the subject must meet the burden of [production and persuasion] alleging and proving by competent evidence-either before the board or in the court on appeal if his standing is challenged-the fact that his personal or property rights are specially and adversely affected by the board's action. A person whose sole reason for objecting to the board's action is to prevent competition with his established business is not a person aggrieved (citing *Kreatchman v. Ramsburg*, 224 Md. 209, 167 A.2d 345 (1961)). *Id.*

Almost five decades later, *Ray v. Mayor & City Council of Baltimore*, 430 Md. 74, 59 A.3d 545 (2013) reviewed and refined *Bryniarski's* aggrieved person evidentiary burden as a three-tiered obligation rooted in proximity to the site of the land use at issue.

Prima facie aggrievement. A protestant is prima facie aggrieved when his proximity makes him an adjoining, confronting, or nearby property owner. When deciding whether a protestant is prima facie aggrieved ... proximity is the only relevant factor. The inquiry is *focused solely* on whether the protestant is an adjoining, confronting or nearby property owner. *Id.* at 74, 83 n.6, 59 A.3d at 550 n.6 (emphasis added) (internal quotation and citations omitted).

Almost prima facie aggrieved. A person who is not an adjoining, confronting, or nearby property owner is almost prima facie aggrieved and offers "plus factors" supporting injury. Proximity is still the sole

determinative factor, but courts have referenced additional claims of aggrievement in specific cases to support their holding. *Id.*

A "nebulous" third category of aggrievement.[9] Recognized only in dicta, this "poorly-defined category" may include protestants with standing who, despite being "far removed from the subject property," may nevertheless be able to establish "the fact that his personal or property rights are specially and adversely affected by the board's action." Although this point has been repeated in other cases ... we have found no instance in which the Court held that a person who was far removed from the site of rezoning actually qualified as "specially aggrieved." *Id.* at 85-86, 59 A.3d at 552 (internal citations and emphasis removed).

Critically, the *Ray* decision, while not a "regime change" contravening stare decisis (the doctrine of precedent by which courts adhere to judicial principles laid down in prior decisions), firmly and narrowly reframed the burden of proof evidentiary obligations of persons seeking aggrieved status. Proof of sufficient proximity is the most important obligation. *Id.* at 84, 59. A.3d. at 500. The new "almost prima facie" aggrieved category applies to protestants nudging up against the "adjoining, confronting or nearby" standard of *prima facie* aggrievement, and generally applies to persons living 200 to 1000 feet away from the subject property if they allege specific facts of their injury ("plus factors"). In other words, once sufficient proximity is shown, some typical allegations of harm acquire legal significance that would otherwise be discounted. But in the absence of proximity, much more is needed. *Id.* at 91-92, 59 A.3d at 555-56 (internal citations omitted).

The *Ray* Court's insistence on evidentiary rigor in cases where a protestant's standing is contested has roots in the "law of standing" principle that persons alleging aggrievement must offer specific facts establishing a *direct* nexus between their claim of special harm that *directly* affects their properties and the government action under challenge. General allegations of harm having a common effect upon the public are therefore insufficient to show special aggrievement. One consequence of the *Ray* Court's high

[9] "Nebulous" is the term used by the Court of Appeals in *State Center* in its review of the *Ray* standing principles. *State Center*, slip op.at 73.

evidentiary expectations on the issue of standing was the elimination of any increase in traffic evidence as proof of aggrievement. This was an easy call for the *Ray* Court, which located support for it in both Maryland case law discussing traffic, where the basis for the court holding in each case was the protestant's close proximity, not the claim of increased traffic and in the legal predicate that alleged adverse effects of additional traffic is never an injury to a property right and therefore never a basis for standing. *Id.* at 96, 59 A.3d at 558. To this end, the *Ray* court denied standing to the protestant Benn Ray, who argued in part that he had was aggrieved because the project at issue would increase traffic, making it more dangerous for him to drive because of area street configurations.

Ray also cleared up the evidentiary requisite for proving special aggrievement based on a protestant's claim of adverse effect on property values, again insisting on rigorous proof—expert testimony. *Id.* at 98-99, 59 A.3d at 559-60. Thus, in *Ray*, the Court rejected as too speculative one protestant's lay testimony about the future value of his property upon completion of the project. *Id.*

Before turning to the specific evidence of aggrievement in this case, we address Appellants' additional arguments. Appellants argue the First Farms motion misrelies on the "specially" aggrieved test for standing in a judicial review of an on the record administration decision, the standing test under the BOA's appellate jurisdiction being "aggrieved person." Appellants cite to no authority or otherwise support what the Hearing Examiner understands is a claim that Two Farms' challenge to Appellants' standing to bring the instant appeal is improperly rooted in the wrong standing test. This claim misreads the gravamen of Two Farms' motion, which is, after declining to concede AMHA is prima facie aggrieved, that AMHA is not "specially aggrieved", one of many terms used by courts in describing the foundational aggrievement threshold of property owner standing doctrine, that owners of real property must be "specially harmed" or "specially and adversely affected" by a decision or action in a manner different from

the general public See, *State Center,* slip op. at 58, 68 (citations omitted). A person claiming to be aggrieved must have a substantial interest in the zoning decision and this interest must be in danger of suffering some special damage or injury not common to all property owners similarly situated.

Appellants also claim the aggrieved person standard and its "proximity" tests are inapplicable to a waiver petition, where the courts have not established "proximity" as "the standard measure of aggrievement" and where a waiver may affect citizens for a multitude of accordant reasons, many not related to whether these citizens actually own nearby property. Appellants are here seeking to impose on a narrow sub-category of land use matters, a waiver from the Subdivision Regulations, an aggrievement standard more liberal than accorded to a broad class of land use decisions with greater potential impact. The claim is analogous to one the Court of Special Appeals rejected in *Ray*, where appellant Ray sought standing based on a new aggrieved class arising from a broad geography of proximity, membership in a particular community of interests or a neighborhood. The court explained: "[c]reating a bright-line rule, under which each person in the entire neighborhood qualifies as a member of the specially aggrieved class ... would be tantamount to abandoning the *Bryniarski* rule that the facts and circumstances of each case would govern. We decline to adopt such a bright-line rule. Instead, we will examine the specific facts alleged to show aggrievement in this case and compare that injury to harm suffered by the general public." *Ray*, 430 Md. at 90, 59 A.3d at 554. Following on the heels of the *Ray* decision, the Court in *State Center* similarly declined to redefine the proximity framework for showing aggrievement in a land use case, a new functional" test for proximity: recognizing the "purpose, intent, scope, size, nature, and consequences of the project" as an element of property owner proximity. *State Center*, slip op. at 65-66. Appellants' argument fails.

Appellants here forge a correlative claim: aggrieved person common law standing principles are inapplicable to a person seeking standing in an appeal from a land use decision to the BOA absent, apparently, a specific holding to this effect. The case law indicates otherwise. In *Chesapeake Bay Found., Inc. v. Clickner*, 192 Md.App. 172, 993 A.2d 1163 (2010), the pre-*Ray* Court ruled the "aggrieved person" common law standing tests in *Bryniarski* control where a statute or regulation imposes an "aggrieved person" test for administrative standing. *Clickner*, 993 A.2d at 1170-75. *Clickner* is but the most recent case supporting the application of common law, aggrieved person standing jurisprudence in appeals by persons aggrieved by an administrative agency land use decision to boards of appeal, and, by statutory extension, to BOA hearing examiners. Maryland judicial opinions have often characterized the statutory aggrieved person administrative hearing standard as "mirroring" common law principles. See *Sugarloaf*, 344 Md. at 288, 686 A.2d at 614 (holding "the statutory requirement that a party be 'aggrieved' mirrors general common law standing principles applicable to judicial review of administrative decisions"), citing *Medical Waste Assocs. v. Maryland Waste Coalition*, supra, 327 Md. at 611 n. 9, 612 A.2d at 248-49 n. 9, quoting *Bryniarski*, 247 Md. at 144, 230 A.2d at 294; *Holland v. Woodhaven Bldg. & Development*, Inc., 113 Md. App. 274, 687 A.2d 699, (1996) ("[t]he principles governing the determination of whether a party is sufficiently aggrieved to possess standing to appeal to a board of zoning appeals were discussed by the Court of Appeals in *Bryniarski*. Specifically, a person aggrieved is one who's personal or property rights are adversely affected by the decision of the [zoning commission]") (alterations in original) (emphasis added.) This Hearing Examiner thus ruled in Board of Appeals Case No. 661-D (decided February 11, 2008):

> The phrase "person aggrieved," when used in an ordinance relating to administrative appeals, has a well-recognized meaning in Maryland spelled out in a line of cases. *Sugarloaf Citizens' Ass'n v. Department of Env't*, 344 Md. 271, 288 (1996). The preeminent case in this line is *Bryniarski v. Montgomery County Board of Appeals*, 247 Md. 137, 230 A.2d 289 (1967). Although the status of Appellants in these cases, which mainly concern appeals from boards of appeals or other

administrative review bodies to the Maryland courts, differs from this case, which concerns appeals to such a body, the matter of "aggrievement" is still the same.

In short, there is parity between the measure of the statutory aggrieved person requirement applicable to the BOA's appellate jurisdiction and the common law aggrieved person standing principles applicable to the judicial review of administrative hearing decisions. In the present case, then, Appellants must be aggrieved under common law aggrieved person principles to be accorded standing.

V. THE MATERIAL FACTS IN THIS PROCEEDING

1. The administrative appeal petition states AMHA is prima facie aggrieved because it is an adjoining property owner, as "adjoining property" is defined pursuant to ZR § 103.A: "[l]and which is touching or would be touching in the absence of an intervening utility or road right-of-way, other than a principal arterial highway." AMHA asserts its property "would be touching" the subject property in the absence of intervening road right-of-ways—Minstrel Way and Snowden River Parkway, neither of which are principal arterial highways.

2. The administrative appeal petition states British American is aggrieved because its property and Two Farms' property are located within the Guilford Industrial Park, which is subject to certain deed restrictions (covenants) and further, that the British American Property is sufficiently close to the subject property to be considered a nearby property owner.

3. Two Farms offered the testimony of Christopher Rosata to rebut AMHA's allegation of prima facie aggrievement. Mr. Rosatta testified to being a founding partner of White and Rosata, a commercial real estate company where he is a commercial real estate appraiser. He has been a real estate valuation appraiser since 1987. Interested Party Exhibit 1 is Mr. Rosata's resume and he testified to being a licensed appraiser in Maryland and a member of the Appraisal Institute. He values commercial real estate properties, the land, not the improvements. He clients include the major commercial banks.

4. Mr. Rosata testified to being familiar with the Two Farms property, the AMHA property and Snowden River Parkway. Both properties are located in the Columbia market and the Snowden River submarket, with which he is familiar. He is also familiar with the proposed right-in/right-out access. He does not believe the access will diminish the real estate value of the AMHA property. He is subject to professional standards in his valuation opinions and for this reason, he does not believe there are any circumstances that would render any injury to the value of the AMHA property.

5. On cross-examination, Mr. Rosatta stated he had not prepared a real estate appraisal of the AMHA property. His opinion that its value would not be diminished is based on his experience of the market area. He did not appraise the British American property. He visited the AMHA property and researched the state assessment (real property) records for the Two Farms and AMHA properties. He also reviewed area property sales in his business database; the AMHA property was not one of them.

6. When questioned by the Hearing Examiner, Mr. Rosatta testified to appraising numerous gasoline service stations and independent convenience store properties. On redirect, he clarified that these appraisals concerned real property where there is a gas station operation, the ongoing business on the property. Real property includes land and any convenience store. His appraisals are limited to the highest and best use of the land, which would not include any business on the property.

7. Mickey Cornelius testified that Interested Party Exhibit 2 is his resume. He is a senior vice-president of the Traffic Group and a certified Professional Traffic Operation Engineer who has conducted more the 2,000 traffic-engineering studies in Maryland, New Jersey, Pennsylvania and New York. He is familiar with both the Two Farms property and the AMHA property. Mr. Cornelius testified to being instrumental in requesting the access waiver. The rationale for the request concerned the location of the subject property, which does not have a lot of depth along Minstrel Way and sits at the intersection of

Minstrel Way and Snowden River Parkway. If all the traffic had to come in and out of Minstrel Way, queuing would likely occur on the access from Minstrel Way. To avoid potential congestion and safety issues, his recommendation was the right-in/right-out access on Snowden River Parkway

8. In Mr. Cornelius' opinion, the proposed access would have no potential adverse impacts on motorists traveling west on Snowden River Parkway, regardless of whether motorists were turning into the AMHA property or continuing west along the parkway, because the proposed access is along eastbound Snowden River Parkway. In his opinion, the AMHA property will not be subject to unique impacts. If the concern is the access affecting the intersection of Snowden River Parkway and Minstrel Way, where some of AMHA's customers travel, then the access reduces traffic through the intersection. On redirect, Mr. Cornelius explained the right-in/out would reduce the overall traffic turning at the intersection to access the Property. The right-out eliminates travel turns within the intersection. Others may come up from the south and Minstrel Way to access the property. Motorists traveling east along the parkway would still travel through the intersection, so the right in does not reduce traffic. When questioned about a U-turn east of the subject property, he noted his unfamiliarity with the turn. Motorist traveling west along the parkway can make a U-turn at the intersection. The volume, however, will be the same. This different movement means travel over two lanes; there would continue to be traffic but no through traffic if traffic signal phasing prevents movement through the exclusive left turn on green. There is no existing, exclusive U-turn green arrow. There are left-turn arrows, so the phasing will not be increased. If cars want to make a U-turn here to access the right in, it will not affect AMHA because it will have no impact on westbound traffic. When asked how motorists would go from the Two Farms property to the AMHA property, he replied that they would go straight through Minstrel Way.

9. Brian England, managing director of British American, testified to the British American property being a short walk from Minstrel Way. Persons who visit his business access it from the Snowden River Parkway/Minstrel Way intersection. His property interests are affected because it will change the whole dynamics of the traffic flow. No study was done on the Snowden River Parkway area in relation to access to the Guilford Industrial Park. Traffic now comes down Berger Road and from Minstrel Way, which causes a traffic problem. It was never intended that traffic should come from this area. So now, Minstrel Way is being used as a short cut, with people traveling through Minstrel Way and the industrial park. The whole intersection is causing a lot of problems. British American courtesy van drivers need eyes in the back of their heads to get through the intersection. Mr. England also testified about a new plan for Snowden River Parkway, including a new lane on each side of the parkway, which will speed up traffic in the heavy traffic area between Broken Land Parkway (to the west) and Berger Road (to the east). The plan is designed to have bicycle paths. What's going to happen is that the whole upgrade will be negated by the access on a 45MPH road.

10. As to the aggrievement on British American being different from the general public, Mr. England testified that the right-in/out access would cause the removal of trees. He is familiar with a turn or gap in the parkway just past the proposed access, but not with anyone using it. As to his testimony that some 4,000 persons would use the access, Mr. England testified the Snowden River Parkway would have a greater impact on British American because the business uses the parkway to test cars. His employees travel the entire area. In his opinion, the access is for the good of the property owner, not the community. He feels he is aggrievedly injured by Two Farms' profit and gain.

11. On cross-examination, Mr. England testified that the U-turn or road cut area is located east of the subject property and the power line. Any lost trees will diminish the value of his property and the

Columbia plan. He conceded that he could not see the subject property from his property. When asked if the British American property might be well over 1,000 feet from the access, he replied that you could see the distance on a map. Congestion on the parkway will also diminish the property's value. He does not know by what dollar amount his property will be diminished.

12. Amran Pasha testified to being the sole and managing member of AMHA, LLC, the property owner of 7100 Minstrel Way. He believes the proposed "intersection" (Mr. Pasha's term) access will have a negative impact on his property interests because there will be an extremely dangerous environment at the intersection. There is a U-turn gap east of the Snowden River Parkway/Minstrel Way intersection, about 300 feet east of the proposed access. The access is about 250-300 feet from the intersection and about another 250-300 feet to the U-turn, which has its own lane, which means three lanes in this area. With the proposed access, anyone who wants to leave the Two Farms property and come back on westbound Snowden River, will have to quickly drive over two lanes, and a third lane in the future, to make the turn and come back. This will cause accidents and traffic to back up near his property. Mr. Pasha testified to using the bank across the street; to avoid traffic signals and save time, he uses the U-turn. He believes his customers will also use the U-turn. You can make a left from Minstrel Way to go west on the parkway, but it is easier to make a right, go east and use the U-turn. So you will have more cars travelling across the eastbound lanes and more people using the U-turn, which will create traffic issues on the AMHA property side of Snowden River Parkway. There is a blind spot at the U-turn and motorists travel faster along this portion of the parkway.

13. Mr. Pasha believes the ensuing dangerous condition will affect AMHA property differently; people will not come to a place where it is extremely dangerous with cars cutting in front of you all the time and heavy accidents at that intersection preventing people from coming into his business, his

property. Concerning Mr. Cornelius' testimony about the traffic signal at the Snowden River Parkway/Minstrel Way intersection, Mr. Pasha testified the current phasing allows motorists heading west and desiring to turn east on a green arrow and green if there is no oncoming traffic. Mr. Pasha again emphasized the diminished value of his property caused by the unsafe traffic environment, which will cause people to stop coming to his business and a consequent negative value on his property. Good traffic is good for business; bad traffic is bad for business.

14. On cross-examination, Mr. Pasha conceded the U-turn area is east of his property and east of the Taco Bell property. The Hearing Examiner questioned Mr. Pasha about businesses behind his property. He explained that there is a strip shopping center behind his property and three office buildings. He conceded the traffic he is concerned could affect some of them. When asked if the bank at the intersection would also be affected by the access, he agreed that it might, but the impact would be less because there is less traffic associated with the bank.

15. In testimony rebutting AMHA's oral testimony, Mr. Cornelius opined that people do not like to cross lanes to use U-turns when they have access to a signalized intersection. People like to use the same entrance and exits. If motorists want to visit the proposed gas station and use Minstrel Way, they will tend to use Minstrel Way to exit, instead of traveling east bound and turning back. He also became familiar with the U-turn after his initial testimony. It is right by the power line and really serves no access. The U-turn will likely be eliminated when Snowden River Parkway is widened. On cross-examination, Mr. Cornelius explained he was not completely familiar with the way the "U-turn" when initially questioned by Appellant counsel, but that he knew of it. He also looked on a map to see it.

16. In testimony rebutting AMHA's oral testimony, Mr. Rosatta opined Mr. England's testimony about any decrease in the value of his property was invalid because he had no professional valuation experience. On cross, he conceded that he had not valuated Mr. England's property.

VI. CONCLUSIONS

As a first matter, the Hearing Examiner declines to assign evidentiary weight to all testimony about the future widening of Snowden River Parkway, including additional lanes, the possible elimination of the U-turn, bicycle lanes, and sidewalks. The Hearing Examiner is aware of such plans through PlanHOWARD2030 and the capital budget process, but the record lacks evidence of any concrete plans. The Hearing Examiner's consistent policy is to not factor into her decision-making any road improvement, community or DPZ plan until officially adopted by the county. Concerning the Snowden River Parkway improvements, it appears they are still in the study or planning phase.

As the court underscored in *Ray*, legally sufficient proof of proximity is the determinative factor in aggrieved person standing. One of the challenges in this case is the absence of any vicinity map exhibits locating Appellants' properties, the Snowden River/Minstrel Way intersection, the location of the proposed access at issue and the U-turn to demonstrate proximity and direct harm, or lack thereof. Appellants declined to introduce any maps identifying the location of their properties as proof of their aggrieved status in relation to the proposed access or to demonstrate traffic congestion at the U-turn. Interested Person Two Farms declined to introduce same to rebut AMHA's alleged prima facie aggrievement and to dispute British American's alleged aggrievement. Consequently, Two Farms provided Mr. England and the Hearing Examiner with internet views of the vicinity using electronic communication devices. Mr. Cornelius apparently reviewed the same electronic view after his principal testimony and before rebuttal. In light of *Ray's* evidentiary expectations concerning proximity,

demonstrating proximity or lack thereof requires more. We now analyze individually whether Appellants British American and AMHA are "persons aggrieved" pursuant to HCC § 16.105.

British American

The administrative appeal petition states British American is specially aggrieved because its property and Two Farms' property are located within the Guilford Industrial Park, which is subject to certain deed restrictions and its property is sufficiently close to the subject property to be considered a nearby property owner. Mr. England cannot see the subject property from his business property. We also must discount as legally insufficient proof, Mr. England's testimony measuring the distance based on the time it takes to walk to the subject property and his testimony that the distance can be determined by looking at a map.

Based on the petition, the motions and oral testimony, the Hearing Examiner concludes British American is not specially aggrieved because the property is a substantial distance from the Two Farms property (and perhaps more than 1,000 feet). The British American property is located at 9577 Berger Road at the southern corner of the intersection of Berger and Gerwig Roads. Gerwig Road intersects Minstrel Way at a substantial distance from 9577 Berger Road. The distance from Gerwig Road to the Two Farms property and the access is unknown. Many intervening features lie between the two properties, including several structures and parking areas, a power line and its large land swath.

The Hearing Examiner necessarily concludes British American's testimony that it specially aggrieved because its property is one of many in the Guilford Industrial Park subject to deed restrictions (covenants) is insufficient proof of special aggrievement. As discussed above, aggrievement requires proof of harm to the individual, not harm arising from membership in a "community," in this case the Guilford Industrial Park. *Ray*, 430 Md. At 89-90, 59 A.3d 554-55. British American may not rely on potential harm

to employees traveling through the area as detrimental harm; any such harm is not a protected property interest. Nor may these travel areas be used to establish proximity. If employee travel were a test of proximity, pizza shops or restaurants with delivery service, car dealerships, and a myriad of other business property owners with delivery service would meet the key proximity test for aggrieved person standing in challenges to a broad swath of DPZ decisions in their service areas.

British American has not met its burden of production and its burden of persuasion that it is almost prima facie aggrieved. The Hearing Examiner concludes British American lacks standing to take this appeal.

AMHA, LLC

The administrative appeal petition supplement states AMHA is prima facie aggrieved because it is an "adjoining property" owner pursuant to ZR § 103.A., which defines "adjoining property" as "[l]and which is touching or would be touching in the absence of an intervening utility or road right-of-way, other than a principal arterial highway." The supplement consequently claims the AMHA property would be touching the subject property in the absence of intervening road right-of-ways, Minstrel Way and Snowden River Parkway, neither of which are principal arterial highways. Beyond this, the petition says nothing about how any AMHA protected interest would be injured by the access. Compare with *Bryniarski* (appeal petition alleging appellants are eligible to bring this petition as aggrieved parties according to the principles of law laid down by the Maryland Court of Appeals). *Bryniarski*, 247 Md. at 147, 230 A.2d at 296.

Mr. Pasha amplified AMHA's status as a prima facie aggrieved property owner through testimony asserting a potential negative impact on AMHA's property interests caused by an extremely dangerous environment arising from the proposed access. This environment would be generated in main part by

motorists wishing to access westbound Snowden River Parkway from the Two Farms property on the eastbound side of the parkway via a U-turn to the east of the proposed access and the AMHA property. This travel pattern would create traffic issues on the other side of Snowden River Parkway. In his opinion, the access will cause more motorists to make the U-turn. AMHA also opined the Minstrel Way/Snowden River intersection would become less safe because more motorists would be making a U-turn on green at the dedicated left turn lane onto Minstrel Way from westbound Snowden River Parkway to turn into the proposed access. AMHA reasons this increase in traffic and attendant conditions will cause people to stop coming to its business, which will devalue the AMHA property. In AMHA's words, good traffic is good for business. Bad traffic is bad for business.

To rebut AMHA's asserted prima facie aggrievement, traffic engineer Mick Cornelius, a certified Professional Traffic Operation Engineer who has conducted more the 2,000 traffic-engineering studies, offered his professional opinion that the access would have no impact on traffic moving west on Snowden River Parkway, regardless of whether motorists were turning into the AMHA property or continuing west along the parkway, because the proposed access is along eastbound Snowden River Parkway. It would have no impact on motorists making a left U-turn at the intersection because there is a dedicated left turn. The Hearing Examiner also credits his professional opinion that a significant increase in U-turns was both unlikely and inconsistent with normal motorist behavior.

The speculative nature of these traffic patterns notwithstanding, this testimony supports a second purpose: to locate the AMHA property proximately enough for AMHA to assert prima facie aggrievement and direct harm. However, intervening the two properties is the Snowden River Parkway, a divided road with a median strip. The proposed access on the eastbound segment cannot be directly accessed from the westbound segment, on the other side of which is the AMHA property. Mr. Cornelius testified to these

facts. AMHA's first offer of proof is the definition of "adjoining property" set forth in ZR § 103, which AMHA enlists to circumvent the intervening features of the parkway and secure prima facie aggrievement status. This definition has no legal bearing on aggrieved person proximity requirements, which are always fact-specific. AMHA alternatively implies an adjoining, confronting or nearby physical relation location—a physical nexus—between its Property and Two Farms' property through an increase in U-turn traffic patterns made by motorists exiting the proposed access and using the U-turn to get into the parkway's westbound lanes or motorists making U-turns at the dedicated left turn lane to turn into the access.

The aggrieved person test requires a showing of direct and immediate injury or harm to a cognizable property interest through proximity. In the Hearing Examiner's view, AMHA's physical location relative to the subject property is too indirect to allege direct harm, where the parkway physically eliminates proximity. The Court's holdings in *Wilkinson v. Atkinson*, 242 Md. 231, 218 A.2d 503 (1966) and *DuBay*, 240 Md. at 182-84, 185–86, 213 A.2d at 488–90 are instructive. In these cases, protestants claimed the views from their homes would be affected, but the Court found the harm insufficient to categorize them as aggrieved persons, where the Baltimore Beltway, if not a complete shield against the apartments to constructed, would serve an adequate barrier (internal quotation marks omitted). Proximity is a factual question of physical, *unobstructed* closeness: "strict" or "pure" proximity is the key to establishing direct harm under aggrieved person standing principles. See, *State Center,* slip op.at 71. While the burden of production shifted to Two Farms to rebut AMHA's claim of prima facie aggrievement, once Two Farms rebutted this claim, the ultimate burden on AMHA was one of proof and persuasion on the issue of direct and specific harm to a property interest by the DPZ decision. The approved access, then, must cause direct special, unique injury to that interest stemming from its proximity to the AMHA property. Having considered the evidence, the Hearing Examiner concludes AMHA is not prima facie aggrieved. Snowden

River Parkway obstructs any proximity between the properties as it relates to the DPZ waiver decision and in the absence of prima facie proximity, there is no presumptive injury.

In the Hearing Examiner's view, AMHA's "U-turn" testimony is more properly framed as an allegation of special aggrievement under the "almost prima facie" aggrieved person test. AMHA, though, does not qualify as "almost prima facie" aggrieved based on the connection made between the two properties by speculative U-turn traffic, should it cause a problem, and any consequential, negative property value at some future juncture. Beyond the Hearing Examiner's conclusion that the intermediate U-turn traffic scenario is an intervening situation or circumstance that removes AMHA's claims of a loss of property value directly stemming from the access—an abandonment of the aggrievement predicate that harm flow directly from the proximity between the two properties—traffic is a general problem under *Ray, a* common effect producing only a general aggrievement, not a legally cognizable injury supporting special aggrievement.

What is more, testimony about a property's decrease in value requires expert testimony. "*Ray* makes it clear that the lay opinions of appellants are legally insufficient to establish aggrievement arising out of a future loss in property value." *Bell v. Anne Arundel Cnty.*, 215 Md.App. 161, 189, 79 A.3d 976, 992 (2013). Two Farms presented the testimony of Christopher Rosata, a commercial real estate appraiser familiar with the Columbia and Snowden River Parkway markets, who offered his professional opinion that the access would not diminish the real estate value of the AMHA property. AMHA offered no such expert testimony and under *Ray*, lay testimony about fluctuations in future property value on planned but uncompleted construction has no evidentiary weight.

Lastly, the Hearing Examiner notes that in reviewing the Courts' analyses of aggrieved person standing based on harm to property values, the protestants alleging such harm were homeowners,

residential property owners, not commercial or business entities. AMHA, LLC, is a business entity and its property is a business asset, as is British American's. The Court of Appeals considered economic harms argued as adverse effects in the recent *State Center* case, where commercial/business property owners seeking standing to appeal the redevelopment of a 25-acre state office complex (State Center) in mid-town Baltimore alleged financial injuries from a future use that may cause them to lose customers and tenants. Concluding these protestants were not "almost prima facie" aggrieved because their properties were a considerable distance from State Center, the Court noted "economic harm" alleged as an injury to a property interest is an impermissible factor under property owner standing doctrine rooted in nuisance and trespass. *State Center*, slip op. at 72-73, 73, n.47. Although AMHA did not testify that its injury stemmed directly from competition, it alleged economic harm to a business asset, a potential decline in property value arising from a loss of customers stemming from Two Farms (commercial) traffic.

For these reasons, the Hearing Examiner concludes AMHA, LLC is not almost prima facie aggrieved due to lack or proximity and no legally cognizable aggrievement.

A Final Note

The administrative appeal petition supplement avers DPZ was arbitrary and capricious in granting the access waiver, contending only the Planning Board can grant the waiver through an amendment to the Final Development Plan and citing to Board of Appeals Case No. 661-D, pointing in that decision to the hearing examiner's analysis of the Planning Board procedure in relation to a proposed access waiver.

The DPZ decision to grant the waiver is a final appealable decision as to DPZ. An administrative agency action is "final" only if it determines or concludes the rights of the parties, or if it denies the parties means of further prosecuting or defending their rights and interests in the subject matter before the

agency, thus leaving nothing further for the agency to do. *Maryland Commission on Human Relations v. Baltimore Gas & Electric Co.*, 296 Md. 46, 56, 459 A.2d 205 (1983) (internal citations omitted).

The February 11, 2014 DPZ decision letter granting Two Farms' request for a waiver, the final decision instigating this appeal, informs Two Farms that: 1) "waiver approval is contingent on completion by the Petitioner of the submission of Site Development Plan SDP-14-013, SRC agency review of the plan, and approval by the Howard County Planning Board" and 2) "Petitioner shall add general notes to F-14-018 and SDP-14-013 referencing this waiver petition, sections, approval and conditions." There is yet, to the Hearing Examiner's knowledge, no Planning Board final decision on the waiver approval.

ORDER

Based upon the foregoing, it is this **5th day of August 2014,** by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the administrative appeal of AMHA, LLC, and British American Building, LLC is hereby **DISMISSED**.

HOWARD COUNTY BOARD OF APPEALS

HEARING EXAMINER

Michele L. LeFaivre

Date Mailed: _____

Notice: A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 calendar days of the issuance of the decision. An appeal must be submitted to the Department of Planning and Zoning on a form provided by the Department. At the time the appeal petition is filed, the person filing the appeal must pay the appeal fees in accordance with the current schedule of fees. The appeal will be heard de novo by the Board. The person filing the appeal will bear the expense of providing notice and advertising the hearing.